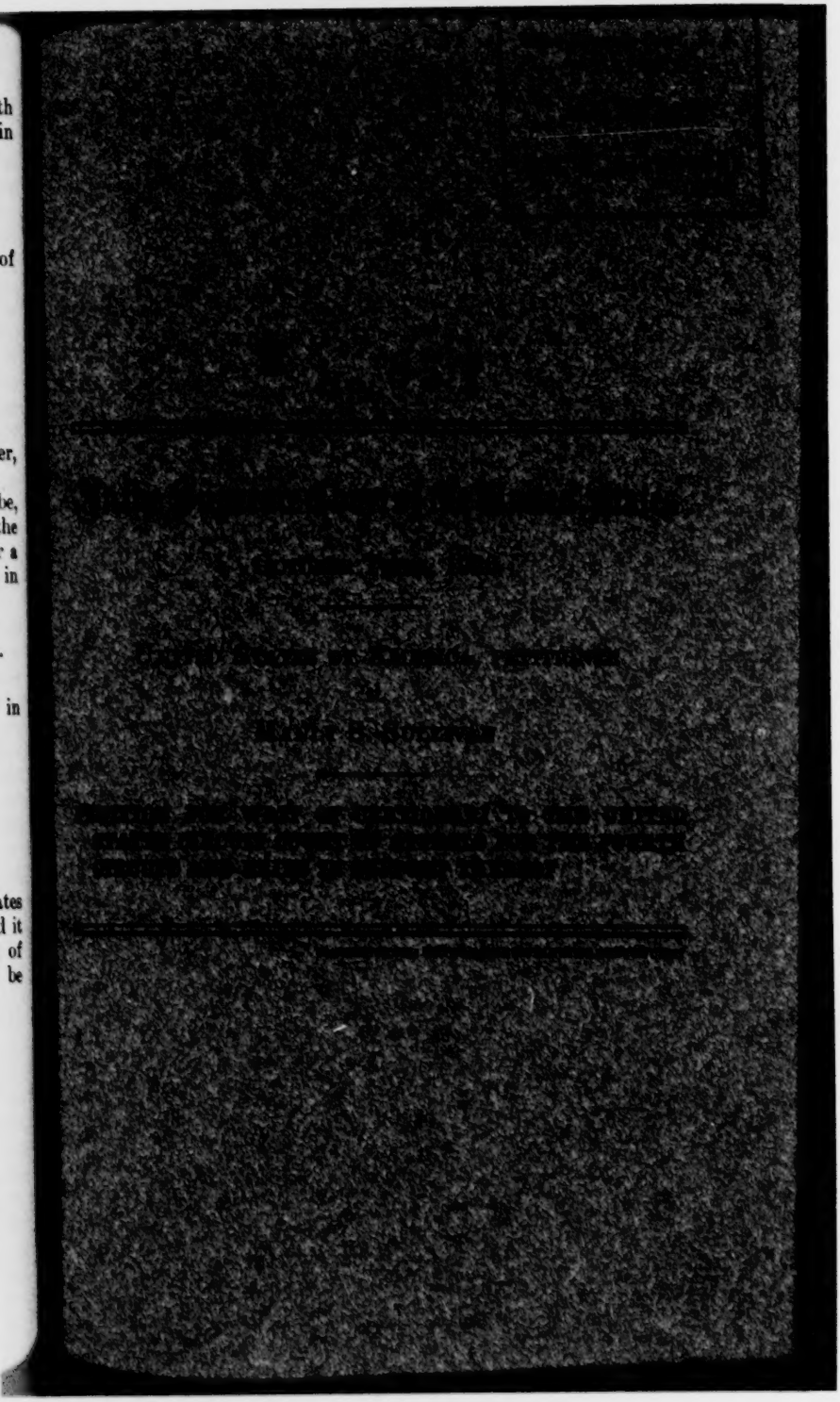

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# In the Supreme Court of the United States

OCTOBER TERM, 1926

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No. ——

UNITED STATES OF AMERICA, PETITIONER

*v.*

MANLY S. SULLIVAN

---

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT**

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fourth Circuit entered in the above case on October 25, 1926 (R. 149), reversing the judgment of the United States District Court for the Eastern District of South Carolina (R. 136).

**QUESTIONS PRESENTED**

The first question is whether the Revenue Act of 1921 discloses an intention on the part of Congress to impose income taxes on gains derived from criminal operations.

Resolving that question in the affirmative, it then remains to determine whether the requirement

that a taxpayer, all or part of whose income is derived from criminal operations, must make an income-tax return, violates the provisions of the Fifth Amendment that no person shall be compelled in any criminal case to be a witness against himself.

## CONSTITUTIONAL AMENDMENT AND STATUTES INVOLVED

The pertinent language of the Fifth Amendment is—

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

Section 223 of the Revenue Act of 1921 (c. 136, 42 Stat. 227, 250) provides as follows:

> That the following individuals shall each *make under oath a return stating specifically the items of his gross income and the deductions and credits allowed under this title*—
>
> (1) Every individual having a net income for the taxable year of $1,000 or over, if single, or if married and not living with husband or wife;
>
> (2) Every individual having a net income for the taxable year of $2,000 or over, if married and living with husband or wife; and
>
> (3) Every individual having a gross income for the taxable year of $5,000 or over, regardless of the amount of his net income. (Italics ours.)

Section 212(a) provides (p. 237):

> That in the case of an individual the term "net income" means the gross income as defined in section 213, less the deductions allowed by section 214.
>
> * * * * *

Section 213 provides (p. 237):

> That for the purposes of this title * * * the term "gross income"—
>
> (a) Includes gains, profits, and income derived * * * from professions, vocations, trades, business, commerce, or sales, or dealings in property * * * or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

Section 214 provides (p. 239):

> (a) That in computing net income there shall be allowed as deductions:
>
> (1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business * * *.
>
> * * * * *
>
> (4) Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in trade or business;
>
> * * * * *
>
> (7) Debts ascertained to be worthless and charged off within the taxable year * * *.

Section 1300 provides (p. 308):

> * * * every person liable to any tax imposed by this Act * * * shall keep

such records and *render, under oath, such* statements and *returns,* and shall comply with such regulations as the Commissioner, with the approval of the Secretary, may from time to time prescribe. (Italics ours.)

Section 1307 provides (p. 310):

That whenever in the judgment of the *Commissioner* necessary he *may require any person,* by notice served upon him, *to make a return* or such statements as he deems sufficient to show whether or not such person is liable to tax. (Italics ours.)

Section 1308 provides (p. 310):

That the Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is hereby authorized, * * * to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return * * *.

Section 257 provides (p. 270):

That returns upon which the tax has been determined by the Commissioner shall constitute public records; but they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary and approved by the President * * *.

Section 1311 amends Section 3167 of the Revised Statutes to read as follows (p. 311):

It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer

or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person * * * the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof * * * to be seen or examined by any person except as provided by law; * * * and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding $1,000 or by imprisonment not exceeding one year, or both * * *.

Section 253 provides (p. 268):

That any individual * * * required * * * to make a return or to supply information, who fails to * * * make such return, or to supply such information at the time or times required * * * shall be liable to a penalty of not more than $1,000. Any individual * * * who willfully refuses to * * * make such return, or to supply such information at the time or times required * * * or who willfully attempts in any manner to defeat or evade the tax imposed by this title, shall be guilty of a misdemeanor and shall be fined not more than $10,000 or imprisoned for not more than one year, or both, together with the costs of prosecution.

Section 1303 provides (p. 309):

That the Commissioner, with the approval of the Secretary, is hereby authorized to

> make all needful rules and regulations for the enforcement of the provisions of this Act.

Pursuant to this authority, Treasury Regulations No. 62 were promulgated. Articles 401 and 402 thereof require that the return of an individual with a gross income of more than $5,000, within which class it is claimed respondent in this case falls, shall be on Form 1040. Article 407 of Regulations 62 further provides:

> Copies of the prescribed return forms will so far as possible be furnished taxpayers by collectors. Failure on the part of any taxpayer to receive a blank form will not, however, excuse him from making a return. Taxpayers not supplied with the proper forms should make application therefor to the collector in ample time to have their returns prepared, verified, and filed with the collector on or before the last due date. Each taxpayer should carefully prepare his return so as fully and clearly to set forth the data therein called for. Imperfect or incorrect returns will not be accepted as meeting the requirements of the statute. In lack of a prescribed form a statement made by a taxpayer disclosing his gross income and the deductions therefrom may be accepted as a tentative return, and if filed within the prescribed time a return so made will relieve the taxpayer from liability to penalties, provided that without unnecessary delay such a tentative return is replaced by a return made on the proper form.

**STATEMENT**

Two indictments were returned against respondent in the Eastern District of South Carolina. One indictment charged perjury in connection with an income tax return for the year 1919, in violation of Section 125 of the Penal Code. (R. 6.) The other indictment, filed March 6, 1923, was in three counts, and charged evasion of income taxes, in violation of Section 253 of the Revenue Acts of 1918 (c. 18, 40 Stat. 1057, 1085) and 1921, *supra*. The first count charged respondent with filing a false and fraudulent income tax return for the year 1919, while the second and third counts (the latter being the only count with which we are here concerned) charged wilful refusal to file returns for the years 1920 and 1921, respectively, alleging that in each of said years he had received profits of $10,000 from his automobile agency and his business of selling beverages. (R. 1–5.) The two indictments were consolidated, and the case was tried at the January, 1926, term of the District Court, at Charleston, South Carolina. (R. 6.) Prior thereto respondent had been tried and acquitted of conspiracy to violate the National Prohibition Act and had pleaded guilty and paid a fine for the transportation and possession of liquor in violation of the National Prohibition Act. (R. 73.) In the instant case respondent appeared without counsel (R. 6), entered a plea of not guilty as to both in-

dictments (R. 5) and conducted his own case. (R. 6.)

When interviewed in 1922 by revenue agents with respect to his income tax liability respondent refused to give any information as to the source of his income, on the ground that to do so would incriminate him (R. 15, 16, 17, 23, 35), but no claim of privilege respecting his failure to file a return was made or suggested until he reached the Circuit Court of Appeals in this case. At the trial he voluntarily took the stand in his own behalf and testified freely that during the years covered by the indictments he was engaged in the unlawful sale of liquor and defended on the ground that instead of conducting said business at a profit it had been conducted at a loss. (R. 71–100.) A part of his gross income was derived from lawful transactions, but the amount does not appear, so it was not shown that he had sufficient ($5,000.00) gross income from lawful sources to require a return as to that. The jury returned a verdict of not guilty on the perjury indictment, a verdict of not guilty on the first and second counts of the income tax evasion indictment, and a verdict of guilty on the third count of the latter indictment which charged willful refusal to file a return for 1921. (R. 135–136.) A motion for a new trial was made and refused; whereupon, on January 25, 1926, a sentence of six months in jail was duly imposed. (R. 136.)

On the same date, respondent sued out a writ of error from the Circuit Court of Appeals for the

Fourth Circuit. (R. 139.) Four errors were assigned. Assignments 1, 2, and 3 were as to the admissibility of certain evidence, and the fourth assignment was on the refusal of the judge to direct a verdict of acquittal " on the ground that on the whole evidence the Government had failed to make out its case against defendant." (R. 137–138.) In his brief and upon argument before the Circuit Court of Appeals respondent waived the first three assignments of error, and thereupon set up for the first time the contention that there should have been a directed verdict because (1) unlawful gains were not income within the meaning of the Revenue Act of 1921 and (2) that, in any event, he was relieved from the duty of making a return by the provision of the Fifth Amendment to the Constitution that no person " shall be compelled in any criminal case to be a witness against himself."

The decision of the Circuit Court of Appeals (R. 142–148) reversing the judgment of conviction of the District Court is on the theory that, although Congress has the power and by the Revenue Act of 1921 manifested an intention to tax the gains of criminal transactions, said Act (1) does not furnish to one who makes incriminating disclosures in his income tax return an immunity from prosecution equivalent to the protection afforded by the Fifth Amendment, because, under *Counselman* v. *Hitchcock*, 142 U. S. 547, and *Brown* v. *Walker*, 161 U. S. 591, the protection of secrecy conferred by Section 3167 of the Revised Statutes, as

amended by Section 1311 of the Revenue Act of 1921, falls short of that secured by the Fifth Amendment; and (2) that the privilege against self-incrimination furnishes a complete defense to an indictment charging any natural person under Section 253 of the Revenue Act of 1921 with failure to file a return of income as required by Section 223 of said Act when the return, if filed, would disclose that income was earned in the course of the commission of a crime, because, under *Boyd* v. *United States*, 116 U. S. 616, and *Arndstein* v. *McCarthy*, 254 U. S. 71, the written statements under oath in the return of the taxpayer in answer to questions propounded therein must be held to be the testimony of a witness, and amount to self-incrimination if they disclose the commission of a crime.

### SPECIFICATION OF ERROR TO BE URGED

The error which petitioner urges as ground for the granting of the writ of certiorari and for the reversal of the judgment of the Circuit Court of Appeals for the Fourth Circuit is:

The court erred in reversing the judgment of the District Court and holding that Section 223 of the Revenue Act of 1921, *supra*, so far as it requires the filing of a tax return by one whose income is derived from the commission of a crime is in conflict with the self-incrimination clause of the Fifth Amendment to the Constitution.

### REASONS FOR GRANTING THE PETITION

The Circuit Court of Appeals held that the Revenue Act imposed a tax on income derived from criminal operations but that a taxpayer can not be required to file a return of such income because of the protection afforded by the Fifth Amendment. Since a return must be complete and truthfully disclose all income, a consequence of the decision below is that no person any part of whose income is derived from criminal operations need file any return.

The result of the decision of the Circuit Court of Appeals is to leave this whole subject in considerable confusion. The Treasury Department states that vast sums have been collected in the form of income taxes on incomes known to have been derived from operations in violation of law. The proper administration of the income tax law seems to require an authoritative settlement of both of the questions involved in this case.

Wherefore it is respectfully submitted that this petition for a writ of certiorari be granted.

WILLIAM D. MITCHELL,
*Solicitor General.*

JANUARY, 1927.

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## BRIEF IN SUPPORT OF PETITION

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### OPINIONS OF THE COURTS BELOW

The District Court rendered no opinion. The judge's charge to the jury will be found at page

110 of the record. The opinion of the Circuit Court of Appeals (R. 142) has not been reported.

## JURISDICTION

The judgment of the Circuit Court of Appeals to be reviewed was entered October 25, 1926. (R. 149.) The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936).

## STATEMENT

A statement of the facts and of the questions presented and copies of the applicable statutes will be found in the preceding petition.

## ARGUMENT

The question whether the Fifth Amendment is violated by requiring the filing of income tax returns by those all or part of whose income is derived from criminal operations is clearly one of importance in the practical administration of the revenue Acts.

Ordinarily, a court will not approach or decide a constitutional question if a decision of that question may be avoided by passing on preliminary questions of interpretation of statutes. The consideration of this case would seem to require, first, an interpretation of the Revenue Act of 1921 with respect to the question whether Congress intended to tax income derived from illegal operations, and, second, whether the information required to be contained in

income tax returns would be incriminating, and if so, whether the requirement of a return violates the Fifth Amendment.

The question of interpretation of the revenue Acts as requiring the taxation of income from criminal occupations was dealt with in the opinion below, and also by the Circuit Court of Appeals of the Second Circuit in *Steinberg* v. *United States*, 14 F. (2d) 564, and with some dissent the conclusion was reached that it was the intention of Congress to tax such income.

It is a question about which there has been some difference of opinion, and it would be of great advantage in the administration of the revenue Acts if the question is finally settled.

But when that question is resolved as it was by the court below, the conclusion that no income tax return need be filed by any taxpayer whose income, in whole or in part, is derived from criminal conduct leaves the administration of the revenue Acts, as applied to such situations, in the greatest confusion.

The provision in Section 3167 of the Revised Statutes, as amended by Section 1311 of the Revenue Act of 1921, does not extend to one making incriminating disclosures in a tax return immunity coextensive with the protection afforded by the Fifth Amendment, if the Amendment be construed to apply to the case. The difficulties resulting from the decision of the court below can not, as a prac-

tical matter, be cured by an amendment to the statutes allowing immunity from prosecution for criminal misconduct to any taxpayer who returns as income the gains from his criminal occupation. Such a provision would offer an opportunity to any criminal who could conceal his offenses until the arrival of the date for filing an income tax return to acquire immunity by the mere act of filing his income tax return.

The authorities, while meager, indicate that the making of a tax return under circumstances such as are here involved is not self-incrimination within the meaning of the Fifth Amendment.

A tax return is nothing other than an official record upon which a taxpayer is required by law to state the account for taxes between himself and his Government. It is thus clearly impressed with a public interest or quality. The rule that the protection against self-incrimination does not apply to public records is well established.

The rule applies to records required by law to be kept by a private citizen for some governmental purpose. Wigmore on Evidence (2d Ed.), Vol. 4, Sec. 2259(c).

In the leading case of *Boyd* v. *United States*, 116 U. S. 616, this Court pointed out the analogy between the Fourth and Fifth Amendments and the object of both to protect the citizen from compulsory testimony against himself, but stated that there were necessarily excepted therefrom certain articles, writings or things, and particular mention was

made of the manufacture or custody of excisable articles "and the entries thereof in books required by law to be kept for * * * inspection" (p. 623).

In *Wilson* v. *United States*, 221 U. S. 361, where the right was sustained to compel a corporate official to produce corporate books over his personal objection that they would incriminate him the same as if they were his own, this Court discussed the rule respecting public records, and stated that the principles applied not only to public documents in public offices—

> * * * but also to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established. There the privilege, which exists as to private papers, can not be maintained (p. 380).

This Court, in support of the above statement, cited with approval such cases as *State* v. *Donovan*, 10 N. D. 203, and *State* v. *Davis*, 108 Mo. 666. In the former there was a statute requiring the defendant, who was a druggist, to keep a record of sales of intoxicating liquors, and in the latter there was a requirement that a druggist should preserve prescriptions compounded by him. These, manifestly, were not corporate records or documents in public offices; yet the public interest in the citizen's private business had resulted in the enactment of

statutes requiring the keeping of records which thereby became impressed with such a public character as to require their production and use over the objection of self-incrimination.

Federal cases to the same effect are *United States* v. *Sherry*, 294 Fed. 684, and *United States* v. *Mulligan*, 268 Fed. 893. The latter case arose under the Lever Act. While this Court subsequently, in *United States* v. *Cohen Grocery Company*, 255 U. S. 81, held a portion of the Lever Act invalid, it was not upon any point discussed in the *Mulligan case*, and such holding does not militate against the reasoning of the court in that case upon the doctrine declared in the *Wilson case*.

The cases so far cited related to public records already in existence, while in the case at bar we are concerned with records which had not yet been created and which it is sought to require the taxpayer to bring into existence; but the rule does go that far. *State* v. *Hanson*, 16 N. D. 347; *People* v. *Rosenheimer*, 209 N. Y. 115; *Ex parte Knoedler*, 243 Mo. 632; Wigmore on Evidence (2d Ed.), Vol. 4, Sec. 2259 (c).

In *United States* v. *Sischo*, 262 U. S. 165, it was decided that a master or owner of a vessel was required to list on his manifest smoking opium despite the fact that its importation was prohibited by penalty and forfeiture. The court below had held that such opium was not required to be listed on the manifest because it was not "merchandise"

within the meaning of that word. The case was first affirmed by an equally divided court, but upon reargument was reversed by a unanimous court. In its opinion this Court said (p. 167):

> There is less contradiction between the requirement of the manifest and the prohibition of the import than there is between such a prohibition and a tax.

The question of incrimination was not considered or decided.

It was held in *United States* v. *Dalton*, 286 Fed. 756, that the immunity from being compelled to give incriminating testimony secured by the Fifth Amendment to the Constitution has no application to declarations required on entries of goods under the custom laws.

In *Harford* v. *United States*, 8 Cranch 108, it was held that articles whose importation was prohibited were nevertheless subject to the provisions of the custom laws prohibiting unlading without a permit, and *Marks* v. *United States*, 196 Fed. 476, upheld an indictment for manufacturing smoking opium without a license and bond long after the importation of such opium was absolutely forbidden.

In the *Sischo case*, one of the reasons urged in the petition for rehearing was the following:

> Unless a clear interpretation of the word "merchandise" is secured from this court, we may find bootleggers and rum runners who have amassed considerable fortunes

> through the sale of prohibited liquor for beverage purposes, contending that they are excused from filing an income-tax return on the ground that the filing of this return would be forcing them to give evidence against themselves of the commission of a crime and pleading the alleged exemption granted them by the Constitution.

There is also the question whether any information such as is required to be furnished in an income-tax return is of such a character as to indicate that there "is some tangible and substantial probability" that the statements in the return may help to convict the taxpayer of a crime. See *Ex parte Irvine*, 74 Fed. 954.

The description of the business of the taxpayer required to be stated in the income-tax return need not be so specific or exact as to disclose an illegal occupation. If the return itself would not disclose incriminating matters, the fact that requests for additional information by agents of the Bureau of Internal Revenue might do so would not relieve the taxpayer from filing the return.

There is also presented the question at what point in the proceedings the taxpayer must claim the privilege. In the case at bar, although the accused, when asked orally for information about his affairs subsequent to the date when his tax return should have been filed, refused to give any information to the revenue agents on the ground that it might incriminate him, the question of self-incrimination

was not raised in any other way or form at the time his return should have been filed nor in the District Court, and was not mentioned until the case reached the Circuit Court of Appeals. In the District Court the accused took the stand in his own behalf and voluntarily testified to the nature of his criminal operations in an effort to establish the fact that he had no income to return.

### CONCLUSION

We think it sufficiently appears the questions presented in this case are of such a nature as to justify the assertion that the case comes within the provisions of Paragraph 5 of Rule 34, which states the considerations controlling in the matter of issuing writs of certiorari, and it is respectfully submitted that the petition should be granted.

Respectfully submitted.

WILLIAM D. MITCHELL,
*Solicitor General.*
MABEL WALKER WILLEBRANDT,
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SEWALL KEY,
*Attorney.*

JANUARY, 1927.

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